United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
Andrew J. Maloney

B

76-1435

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1440

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. KING and
A. ROWLAND BOUCHER,

Appellants.

On Appeal from the United States District Court
For the Southern District of New York

REPLY BRIEF FOR APPELLANT BOUCHER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR APPELLANT A. ROWLAND BOUCHER

This brief is submitted by appellant A. Rowland Boucher in reply to the Government's arguments in Points IV and V of its brief on Boucher's claims of error in the trial court's refusal to charge or permit a defense of reliance on counsel and its admission of certain inflammatory collateral matters without permitting the defense to rebut the resulting misconceptions.*

INTRODUCTION

After reciting an uncharacteristically argumentative statement of facts, the Government seeks to persuade this Court that the basically simple and unassailable proposition that there was adequate foundation in the record, to wit, Defense Exhibits AB and BK, justifying at least appellant's right to a charge and a defense of reliance on counsel, somehow does not exist. The Government, by the injection of such extraneous facts as the 'Lark' transaction and the events of 1971,** attempts to persuade the Court that such a defense on Boucher's part would not be credited by the trier of fact. The issue, however, before this Court is not whether and to what extent a jury would accept such a

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* Boucher, relying on Point II of his original brief, to wit, the issue of bankruptcy immunity, deems no reply necessary. As to all other points which were joint points with appellant King, Boucher relies on the reply brief submitted by King.

** The only events of 1971 of any relevance to the reliance on counsel issue were the circumstances surrounding the signing of a 1971 representation letter on a theory of a cover-up to the events of 1969-70. However, the facts underlying the signing of such letter would reinforce Boucher's claim of reliance on counsel (see pages 11 and 12 of Boucher's original brief).

defense, but whether Boucher should be denied the opportunity to raise the defense.

Despite a lengthy brief reviewing King Resources Company's ("KRC") activities over a four-year span submitted by the Government, the record below unmistakably shows that a prima facie case could have been sustained only on the testimony of Robert Hulsey ("Hulsey") -- the same Hulsey who confessed to being confused, befuddled, and inconsistent on facts which occurred some seven years prior to his trial testimony.* (Tr. 868, 872, 880, 892, 897-900, 901-903).

GOVERNMENT'S CONTENTIONS

The Government contends that (a) Boucher's denial of discussing material facts with counsel excludes his defense of reliance on counsel, (b) in any event, there was an insufficient record to predicate such a defense, (c) the proposed charge was incorrect, and (d) because the Court prevented proof of "another similar act" and Boucher, in any event, argued the defense, he had the best of all possible worlds.

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* We do not now, nor did we in our original brief, argue the sufficiency of the case below. However, the lumping by the Government of its "facts" against both appellants requires this reemphasis as to the thinness of the Government's case against Boucher. The Government's view of the facts surrounding COG strains their prerogative of viewing the evidence in the most favorable light to the Government on appeal, when every principal involved in the transaction (King, Boucher, Trueblood, Booth, Cooper, Gutjahr, Rodden, Daley and Adams) deny any knowledge of any side deal.

ARGUMENT

POINT I

THE GOVERNMENT'S BRIEF ATTEMPTS TO OBSCURE BOUCHER'S CONTENTION THAT THERE WAS SUFFICIENT BASIS IN THE RECORD TO PERMIT A DEFENSE OF RELIANCE ON COUNSEL

The gravamen of the charges below was Boucher's misrepresentations in two letters dated January 23 and May 27, 1970 to Arthur Andersen & Co. representing the bona fide arm's length nature of certain transactions,* to wit, the existence of secret buy-backs.

After Boucher's direct testimony, and the introduction of Exhibits AB and BK**, the Government recognized, albeit implicitly, that Boucher had made out a sufficient foundation for a defense of reliance on counsel. As the record shows, they asked permission of the Court to rebut this defense by proving a "similar act", the Lark transaction. (App. 1322 B).

After prolonged colloquy as to the wisdom of introducing this "similar act", which would further prolong the trial and the fact that 'Lark' had been discussed at length in Boucher's claimed

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* The critical transactions, as discussed earlier, reduced itself to the Mecom transaction. Boucher has not attempted to respond to an exaggerated and at times misleading review of such side issues as Fox-Raff, COG, Bristol Bay, the Ohio loan and the so-called coverup.

** Exhibit AB is the Arthur Andersen memorandum of January 20, 1970 pertaining to a meeting with Lowry and Boucher as to the legal binding nature of the transactions referred to in the letter dated January 23, 1970 (App. 1104-06).

Exhibit BK is KRC attorney Fishman's draft of the May 27, 1970 letter approved by Lowry (App. 1154-55).

immunized bankruptcy testimony, the Court offered Boucher a Hobson's choice of withdrawing this issue or permitting 'Lark' to be introduced. (App. 1318-19) Notwithstanding, Boucher pressed for a defense of reliance on counsel, and the Court, after further cross-examination, denied the defense solely* on the grounds that (i) Boucher could not recall relying on counsel nor (ii) having discussed the fa ts with counsel. The Court did not permit the Government to prove 'Lark'. However, there was no quid pro quo, as the Government seems to suggest.**

Despite the record below and the Government's recognition of a reliarce on counsel defense, it now argues that there were never any grounds for such a defense, and that, in any event, Boucher relied on the defense in summation. The Government has footnoted counsel's argument, which belies such a contention, and it is evident all counsel was arguing was Boucher's "credibility" in his summation, namely, that Boucher could not remember relying on counsel whereas if he had, it would have been helpful (App. 1346B).

I FAILURE TO RECALL RELYING ON COUNSEL

In the peculiar and compelling circumstances of this case, namely, seven-year old transactions, where virtually all the principals, including the Arthur Anderson witnesses had no precise

* The Government now argues, speciously, that Boucher's request to charge was erroneous. However, as the record reflects, neither the Court nor the Government ever discussed the request or modification thereof, United States v. Stagman, 446 F.2d 489, 493 (6th Cir. 1971); United States v. Platt, 435 F.2d 789, 793 (2d Cir. 1970).

** The Government's brief speaks of a "double-edged sword" (G. Br. at 92, fn.*) in suggesting that Boucher benefitted in any event, because 'Lark' was kept out. However, as earlier colloquy would indicate (App. 1317), Boucher believed there would have been a failure of proof as to his involvement.

or little recollection, and of necessity had to rely on contemporaneous memoranda, a failure of recollection by Boucher was understandable. The best evidence of the events in question were documentary, namely, Exhibits AB and BK.*

II BOUCHER'S DENIAL OF KNOWLEDGE

The Government further contends that Boucher's denial of knowledge of any side agreements and thus his failure to discuss material facts with counsel precluded him from invoking a reliance on counsel defense. However, even the Government concedes at page 94 of its brief, that "... if Boucher did not inform Lowry himself of all relevant facts, Boucher at lease have [sic] reasonably believed that Lowry had knowledge of all material facts." As a result, is there not, then, a jury question?

A Jury could have found, in reconstructing the events of the winter of 1969-70, Boucher knew that Lowry was King and KRC's "senior

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* The Government's brief, at page 89, by artful sleight of hand suggests that Appellant's counsel did not cross-examine Lowry and Fishman, with reference to Exhibit BK (the May, 1970 draft), to substantiate the reliance on counsel defense. Lowry testified on June 7, 1976, and Fishman on June 17, 1976, prior to Boucher's discovery of Exhibit BK in the Government's files the Saturday before his trial testimony (Tr. 2963-64). Certainly, in view of Boucher's already strained financial resources that would not allow recalling out of town witnesses, the Government and the trial court's emphasis on order of proof is both unfair and an over-refinement (Tr. 2768). As noted earlier, Judge Frankel recognized that Boucher had for some time been proceeding pro se up to the eve of trial in this case, which the Government at one point noted consisted of eleven (11) file cabinets of documents. (J. Frankel Memo Op. 3/14/76). In any event, the Government has never questioned the authenticity of Documents AB and BK.

lawyer" and, as he had in the past, would pass on significant transactions involving King and KRC (Tr. 1369-1373, 1412, 2956). Boucher, by 1970, had every reason to believe he was relying on an attorney who was in a position to know all the facts, namely, KRC's chief counsel T. G. Lowry. The Government's proof was that Lowry drafted Mecom's side agreement, was in touch with Mecom's attorney, Marriott, on the Arctic sale transaction, and knew of a modus operandi by which Mecom could make his down payments, even if he did not now recall the specific $275,000 advance (Tr. 1405-06, 1408-09; G. Ex 1). A fortiori, Lowry had to know as much as anyone, indeed, probably more. Yet Lowry then and now still finds these transactions bona fide and arm's length and that Exhibit 1 (the side agreement) was merely "frosting on the cake" (Tr. 1423-26, 1452-54).

Furthermore, the Government itself makes the point that "after speaking with Boucher, Hulsey advised Marriott [Mecom's attorney] that Tim Lowry, KRC's general counsel, 'was preparing the cross letter agreement which...fully set out the understanding.'" (G. Br. at 13). Hulsey in confirming that Boucher advised him to have Lowry "...take care of satisfying Mr. Marriott" (Tr. 842, 884) evidences, according to the Government's own proof, that there was discussion between Lowry and Boucher on these matters.

In sum there was ample evidence in this record to support a defense, that Boucher either had discussed the facts with Lowry or had reason to believe Lowry knew all the facts before opining as to the bona-fide nature of these transactions and again giving the "OK" on the May 27, 1970 representation letter.

Having concluded that there was a basis for a defense of reliance on counsel* in the context of a case where most of the participants had little recollection because of the passage of time, alternative defenses should not be precluded. Furthermore, alternative defenses have not been regarded as fatal by the courts. As one court held,

> ". . . a defendant in a criminal prosecution may assert inconsistent defenses. The rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the Government's opportunities for invoking the criminal sanction." United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975).

Although in this Circuit the Court has left open the issue of alternative defenses, this Court, in the compelling circumstances of this case, should resolve the issue in Appellant's favor, United States v. Swiderski, 539 F.2d 854, 859, fn. 4 (2d Cir. 1976); Johnson v. United States, 426 F.2d 651 (D.C. Cir. 1970), cert. dismissed, 401 U.S. 846 (1971); Whittaker v. United States, 281 F.2d 631 (D.C. Cir. 1960); Sherrill v. Wyrick, 524 F.2d 186, 188 (8th Cir. 1975); United States v. Harbin, 377 F.2d 78, 80 (4th Cir. 1967).

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* As noted earlier, "...the threshold required for this [reliance] is not very high." U.S. v. Platt, supra, at 792.

POINT II

THE GOVERNMENT HAS FAILED TO REBUT APPELLANTS' CONTENTION THAT INFLAMMATORY EVIDENCE ON COLLATERAL MATTERS WAS ERRONEOUSLY INTRODUCED WITHOUT APPELLANTS BEING GIVEN A FAIR OPPORTUNITY TO CHALLENGE THE RESULTING MISCONCEPTIONS

The Government's response to the arguments set forth in Point III of our initial brief essentially admits the observation made therein that the prosecutors employed a two pronged strategy in this case: (i) they insinuated (without being required to prove) that appellants had "ripped off" FOF (inviting condemnation and conviction on that basis alone); and (ii) attacked the worth and potential of the Arctic so that it would seem that no one -- particularly sophisticated oil and gas investors such as Mecom and COG -- would have been willing to enter into the 1969 Arctic contracts without secret inducements and guarantees.

The Government defends the first prong of its strategy by arguing that the challenged evidence was admissible on the collateral issue of "motive". If nothing else, the Government's brief illustrates its continuing preoccupation with such collateral matters. Faced with the Government's penchant for overkill at trial, Judge Frankel was moved to comment to counsel that too much of the Government's case was "window dressing", but he nevertheless did little to prevent it from being submitted to the jury. It was this very "window dressing" -- which the Government now refers to as its "mosaic

of proof" (G. Br. at 52)-- which was designed to, and did in fact, inflame a jury unfamiliar with the oil and gas business.

The second part of the Government's strategy was conceded. Thus, the Government acknowledges its attack on the reasonableness of the Arctic sales price (and thus the Arctic's value) in order to show that King and Boucher could not find a buyer at FOF's asking price without providing him with secret inducements (G. Br. at 112n). Whether or not this line of attack was permissible, it certainly was reversible error to preclude appellants from rebutting these contentions by showing that knowledgeable persons with confidence in the Arctic's potential would have been willing to purchase interests on similar terms without any side deals.

A. The Evidence That Was Erroneously Admitted

1. Mark-ups and "Gross Profit": The Government succeeded in introducing, over defense objections (App.1281-82), various charts and schedules purporting to summarize the extent and nature of KRC's dealings with FOF over the three-year period 1968-1970. This evidence was in no way limited to FOF's Arctic purchases, which represented in the aggregate less than 15% of KRC's total sales to FOF.

Initially, the Government defended the admissibility of this evidence on the ground, as alleged in the indictment, that the mark-ups which KRC had charged in its sales to FOF were part of the fraud (App.1205). Midway through the trial, however, the prosecutor accepted the Court's suggestion that the evidence on mark-ups and gross profit margins should simply be called something else -- proof as to "motive" (Tr. 2750-51). In this manner, evidence that had been designed initially to prove fraud was admitted in the same form as originally intended but under a slightly modified rubric. Defense counsel complained that regardless of the characterization, the impact on the jury would be the same. Moreover, without access to the underlying property records of KRC,* the defense was deprived of fair opportunity to rebut the Government's intimations of fraud.**

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* A reasoned analysis of KRC's sales to FOF, as opposed to the Government's emotionally charged presentation, would have involved a review of far more factors and facts, including: the nature and identities of particular properties sold; the geologic, geophysic and engineering reports relating thereto; the potential of the properties; the services to be rendered by KRC with respect to the properties; the degree of success (or lack thereof) ultimately realized; comparable sales by KRC to other parties; and the manner and terms of similar sales in the oil industry as a whole.

** The prosecutor candidly acknowledged to the Court the likely effect that the mark-up and profit margin evidence would have on the jury (App. 1217). Indeed, he could hardly have said otherwise given the fact that such evidence had been originally designed to have just that impact. Nevertheless, the Court refused to place any restrictions on the extent of the Government's proof in this area.

On appeal, the Government adopts a new justification for its tactic, stating that such evidence was "vital" to its case (G. Br. at 97) because "[w]ith this information, it was easier for the jury to understand why King and Boucher were willing to arrange fraudulent transactions for FOF's benefit and lie about those transactions so that FOF would believe it was benefitting from their relationship and would continue it" (G. Br. at 102). But the plain fact is that once it succeeded in getting the evidence of mark-ups and gross profit into the record, the Government returned to its original theory as to the nature of alleged fraud, arguing to the jury that appellants had "milked" FOF (App. 1202) -- that KRC had made money from FOF "like nobody ever made before" (App. 1344F) -- and that in FOF, appellants had found "the biggest gold mine that they ever struck" on the "best structure they ever saw" (App. 1344F).

This evidence should have been excluded. Under Fed. R. Evid. 403, even relevant evidence (which this was not) "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." See generally Dolan, Rule 403: The Prejudice Rule in Evidence, 49 S. Cal. L. Rev. 220, 238-39 (1976).* The Advisory Committee's Note

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* The limitations of Rule 403 were placed on appellants, but the gates were opened for the Government. Contrary to the claim made by the Government (G. Br. at 102n), Judge Frankel, sua sponte, precluded defense counsel from questioning an Arthur Anderson accountant on an internal memorandum which had focused on KRC's profit margins and determined them to be reasonable. Counsel first identified the document, which had been prepared by someone working under the witness' supervision (App. 1278A-B). No offer of the document was made pending certain background questions on accounting matters. Then, during a question specifically related to the Government's comparison of gross sales to gross profits, the Court cut off further questioning in the entire subject area (App. 1279). When counsel asked for a bench conference so that he could explain the direction of his examination and his desire to offer the document previously marked only for identification (counsel was still holding D. Ex. AC in his hand), the court refused to discuss the matter (App. 1280), even though it had never seen the document.

to Rule 403 defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis." Judge Frankel appeared to recognize this danger in his observation that, given the breadth of collateral material introduced by the Government, he had "a question whether anybody will know what a conviction meant, if there is one." (App. 1206-07). Under such circumstances, and given appellants' concessions of the basic facts needed to establish the Government' theory as to motive,* it was a clear abuse of discretion to admit the proffered evidence in virtually unrestricted fashion.

Moreover, the Government's distorted presentation of KRC's relationship with FOF magnified the prejudicial effect of the Government's collateral evidence. While the Government claims that its charts and schedules "detailed the extent of the KRC-Colorado Corporation relationship with FOF . . ." (G. Br. at 101), the most noteworthy aspect of its mark-up presentation lay in its omissions. The Government fails to address the direct attack

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* None of the "motive" cases relied upon by the Government (G. Br. at 96.-7) appear to have involved situations where comparable concessions had been made. The Government's suggestion (G. Br. at 102-03) that it had no way of knowing prior to King's testimony that appellants would concede the basic facts essential to the Government's "motive" theory is in error. Judge Frankel would not have suggested an attempt at stipulation during the Government's direct case if it had not already become clear to him that the parties were not really very far apart on this point. But the defense could not stipulate to the Government's facts which it consistently maintained were distorted and incomplete.

The Government contention that King later denied that FOF was KRC's most profitable customer is misleading. As explained in defense counsel's summation (Tr. 4341), King did not deny that FOF was KRC's most profitable customer, but maintained with respect to profit margins on particular sales that there had been various non-FOF deals which had involved higher profit margins than FOF sales (App. 1331H) King expressly conceded that FOF was KRC's biggest source of revenues (App. 1331D) and the largest customer in terms of gross business (App. 1331G).

on the deficiencies of its presentation (see Point III of Boucher's original brief to this Court). After summarizing the information contained in its exhibits, the Government asserts that its presentation was unobjectionable because it had been derived from KRC's turnkey ledgers. What it fails to state, however, is that these ledgers were not KRC's definitive financial records. Rather, as KRC's former chief financial officer testified, they were computerized management tools for checking whether KRC had received and properly booked all bills for work done in a particular year in accordance with management's original authorizations for expenditures. In other words, the turnkey ledgers were designed to enable management to ascertain whether particular projects were being handled within budgetary estimates. This kind of controls system was particularly important with respect to turnkey drilling contracts (hence the name "turnkey ledgers"), where KRC would agree to drill a well or wells for a customer to a stated depth at a specified price, regardless of cost. These ledgers had never been designed to analyze the profitability of lease sales (interests in exploratory acreage), where the largest markups occurred, and did not necessarily contain all KRC's costs attributable to any particular property (App. 1292Y). Nor did they attempt to allocate indirect costs. Despite the incompleteness of these ledgers, the Government's accountant made no attempt to go beyond them, or to make any allocation of KRC's indirect costs (Tr. 2695-97).

The Government attempts to minimize appellants' objections by complaining that they go to the "accuracy and completeness of the Government's presentation" and thus cannot serve as the basis for reversal. But the cases in this Circuit are plain that before charts, summaries or schedules are to be admitted, they must be scrutinized by the trial court "to see whether they fairly represent and summarize the evidence on which they are based." United States v. O'Connor, 237 F.2d 466, 475 (2d Cir. 1956), citing United States v. Altruda, 224 F.2d 935 (2d Cir. 1955).

In Altruda, a tax fraud prosecution based upon the "net worth method", the Government introduced charts and schedules tending to show the sum of defendant's net worth increases and the amount which the defendant failed to report. Although the Court noted that the figures and calculations contained therein were supported by data obtained from the defendant (as the Government argues here with respect to the turnkey ledgers), it reversed the jury's verdict because one of the principal charts had failed to reflect certain adjustments (although the information could be gleaned from another chart in evidence). Very simply, the documents and calculations in Altruda did not "present the complete picture" (224 F.2d at 940). Nor did the exhibits in this case. Not only did the schedules of lease sales (App. 855-61) give the jury the incorrect

impression that all costs had been reflected in depicting KRC's gross profit on such sales, but also the treatment of the aggregate gross profit margins on all KRC's sales to FOF was unfair in its refusal to undertake any allocation of indirect costs.* Moreover, the failure of Government exhibit 38M to disclose KRC's $53 million loss in 1970 while portraying gross profit of $14 million was materially misleading. While the Government argues that the chart showed a sharp decline from 1969 results, the 1970 sales were approximately 1968 sales, and the "gross profit" for 1970 was depicted as being even higher than the "gross profit" for 1968.

Similarly misleading Government exhibits were condemned in Watkins v. United States, 287 F.2d 932 (1st Cir. 1961), a tax evasion case wherein the defendant contended that his omission of certain sales receipts from his income tax returns had not been willful. The Government was permitted to introduce into evidence a summary which compared the amounts the defendant had listed as deductible travel expenses in his tax return with the amounts the defendant had recorded in a memo book. The defendant testified that the memo book was a record of his cash payments of travel expenses, and that he had also paid such expenses by

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* The Government is wrong when it asserts that appellants' suggestions as to cost allocations were not raised below. The propriety of allocating indirect costs on the basis of sales was established at trial through the cross-examination of Hubbard, an accountant and a Government witness (App. 1278B) that an allocation of indirect costs to FOF sales would result in a greater gross profit attributable to such sales than showed by the Government. As noted in the first footnote on page 33 of our initial brief, if properly allocated, more indirect costs would be imposed on sales to FOF, since KRC provided considerably more services to FOF than to any other customer.

check without incorporating the amounts of the checks in the memo book. The IRS special agent acknowledged the existence of certain checks, but said that he had not gone through them because the aggregate amount of the checks was not sufficient. The First Circuit reversed the conviction, stating that the Government's summary's use of the term "overstated" as the label for the difference between the items shown in the tax returns and the items shown in the memo book rendered the exhibit prejudicial. As shown above (and in our initial brief), the Government's charts and schedules in this case contained similarly misleading and prejudicial mischaracterizations especially with respect to the Government's failure to reflect all KRC's costs affecting the profitability of its sales to FOF, thereby grossly overstating KRC's profit.

As a result of its inflammatory and distorted presentation, the Government was able to obtain a "bad man conviction" against both appellants. United States v. Robinson, 544 F.2d 611, 618 (2d Cir. 1976). A proper application of Rule 403 would have been to exclude or severely limit this evidence. See Dolan, Rule 403: The Prejudice Rule in Evidence, 49 S. Cal. L. Rev. 220, 238-39 (1976).

2. The Global Spin-off. On this appeal, the Government attempts to minimize its own mischaracterizations of the effects of the Global spin-off in the Fall of 1970 by arguing (i) that it had made very little use of the spin-off at trial (G. Br. at 107-108) and (ii) that it had never intended to rely upon the spin-off as its primary claim as to the damages caused by the revaluation (G. Br. at 109n).

In the first place, it is clear from the record that the Government's presentation of the Global spin-off (as described at pages 40-42 of our initial brief) was deliberately designed to, and did in fact, have significant impact on the jury. The Government introduced this evidence through its very first witness (Tr. 243-44; 246-50; 382) and referred to it in its rebuttal summation as proof of damages suffered by FOF and the true value of the Arctic.

As presented by Government, the Global spin-off was deceptively simple. Here was proof, the Government suggested, that the Arctic had really been worth $2 per acre, not $15 per acre. But the prosecutors well knew that the matter was far more complex. In the Fall of 1970, following months of crisis within FOF and IOS and press criticism of the Arctic revaluation, it is not surprising that European investors, already burned by IOS, would not be willing to bid in the over-the-counter market for the shares of the new closed-end corporation. At the time of the spin-off, Global had not even had an opportunity to staff itself with the professional management competent to develop its assets, and the company clearly lacked the funds that would be needed to fully develop the potential of its exploratory

acreage. Under such circumstances, it was not even certain that the company would be able to retain its Arctic position long enough to realize that potential.

Furthermore, the fact that the prosecution now disclaims any heavy reliance on the spin-off only serves to confirm the limited probative value of this deceptively simplistic but highly misleading evidence.* For the court to have permitted the Government to argue that the alleged damage resulting from the spin-off demonstrated the motive for the alleged fraud (itself a collateral issue) was a clear abuse of discretion.**

3. The MacKenzie Statements. As part of its efforts to convince the jury that FOF's Arctic interests were worth far less than $15 per acre, the Government made effective and repeated use of an off-the-cuff remark of a witness it had under subpoena but never produced. Near the close of a long KRC board meeting in the Spring of 1971 which had been called to discuss a dispute between KRC and COG, Neil MacKenzie (who had not played any direct role in the Mecom or COG sales) offered his

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* The spin-off evidence was wholly collateral. Its only conceivable relevance was to prove damage to FOF and, thereby, motive. The probative force of such evidence was exceedingly weak, since it was hardly in appellants' interest to inflict damage on their best customer, especially where they were not even the recipients of the moneys claimed to have been lost.

** Far from damaging FOF stockholders, the spin-off was designed to preserve the values of FOF's natural resource properties. Those stockholders who did not believe in the Arctic's potential were given an opportunity to redeem their shares at a net asset value which fully reflected the December 1969 revaluation price. Those stockholders who chose not to redeem, made their decision despite notice of all the adverse press criticism. Today, Global's interest in the Arctic is extremely valuable.

views on how KRC should respond to COG's ultimatum. At one point in his remarks, MacKenzie was interrupted by Frederickson, who asked whether the price COG had paid for its Arctic interest was too high. MacKenzie responded, without any further explanation, that the price was "ridiculous". He then continued with the points he had been trying to make before Frederickson's interruption.

No one at the meeting, including Frederickson, pursued this aside on COG's purchase price.

The Government argued, however, that because Boucher had been present at the meeting when MacKenzie responded to Frederickson's interjection and had made no response, Boucher, as a matter of law, had adopted the truth of MacKenzie's comment. This was clearly erroneous, and the error was compounded when the court permitted the Government to employ MacKenzie's remark against both appellants.

This Court's recent decision in United States v. Flecha, 539 F.2d 874 (2d Cir. 1976), compels the conclusion that MacKenzie's statement was inadmissible. As that case emphasized, and Wigmore had long before explained, inferences based upon silence may safely be drawn ". . . only when no other explanation is equally consistent with silence; and there is always another possible explanation - namely, ignorance or dissent - unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct." Id. at 877

quoting 4 J. Wigmore, Evidence §1071 (Chadbourn ed. 1972) (emphasis supplied by the Court).

Under the circumstances described below, it would have been neither reasonable nor probable for Boucher to have responded to MacKenzie's criticism of COG's willingness to pay $15 per acre for its Arctic interest. Wiedemann v. Walpole, 2 Q.B. 534, 539 (1891), quoted in 539 F.2d at 877 (Admissible statements limited to "circumstances which render it more reasonably probable that a man would answer the charge made against him then that he would not.").

In the context in which the remark was made, MacKenzie was being critical of COG management, not Boucher. There was no charge that COG had been given secret inducements, or that Boucher had done anything improper.* There was no reason for Boucher to view this remark as an attack upon him, or for Boucher to come to the defense of the management of a company with whom he was locked in a heated dispute. To have done so would have been to deflect the meeting away from its intended course and aggravate the already pressing time constraints facing KRC in its dispute with COG.

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* The absence of any semblance of attack on Boucher in MacKenzie's remark, before others who had been involved in the Arctic transaction, renders the cases cited by the Government in the text of its brief at page 125 totally inapposite.

The trial court fell into the same error against which Flecha and Dean Wigmore have "so clearly warned, . . . of jumping from the correct proposition that hearing the statement of a third person is a necessary condition for adoption by silence . . . to the incorrect conclusion that it is a sufficient one." Id. at 876-877 (citations omitted).

The level of argument to which the Government has sunk on this point can be seen from its suggestion that Boucher's silence under the circumstances would be treated as an admission "[w]hether MacKenzie was an expert or a lunatic . . . since in either event Boucher would presumably have objected to MacKenzie's statements if he believed them to be wrong" (G. Br. at 120). Surely the Government does not suggest that responding to a lunatic is a reasonable, much less required response and while MacKenzie was hardly in that category, the context in which he made his remark to Frederickson made a response by Boucher equally improbable.

The Government attempts to bypass the import of Flecha by asserting that the circumstances in which MacKenzie spoke do not affect admissibility, but only the weight to be given by the jury to Boucher's silence (G. Br. at 120). The rule is otherwise. Because "the inference is a fairly weak one, to begin with" Advisory Committee's Note to Fed. R. Evid. 801(d)(2)(B), quoted in Flecha, 539 F.2d at 877, and there is an "extreme danger of prejudice to the defendant

once the accusation and his silence reach the jury," 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 801(d)(2)(B)[01], at 801-125 (1976),

> [t]he question of fact whether the party's conduct manifested his assent to the statement of the other person is a preliminary question for the judge. Unless he so finds, the statement is excluded. McCormick, Evidence § 246 at 527 (1954), quoted with approval in Weinstein & Berger, supra at 801-120.

Judge Frankel never purported to make any such finding, but rather, as the Government's argument indicates, completely delegated the question to the jury (Tr. 3926).

The Government's denial that it used MacKenzie's statement as expert opinion is absurd. It is the context in which a remark is used, rather than whether the person who said it was expressly termed as "expert" that discloses the manner in which it was conveyed to the jury. "Experts may be men of science educated in the art or persons possessing special or peculiar knowledge acquired from practical experience." Empire Oil & Ref. Co. v. Hoyt, 112 F.2d 356, 360 (6th Cir. 1940). Boucher described MacKenzie's competence and qualifications in similar terms, and the prosecutor alluded to that description in his summation (G. Br. at 121). The prosecutor's reason for touching MacKenzie's credentials had nothing to do with the issue of admission by silence,* but rather were designed to enhance the credibility of MacKenzie's opinion of the Arctic price. Judge Frankel recognized that this was precisely the Government's intent when he refused to limit the use of MacKenzie's statement in the following terms:

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* As discussed above, the Government contends that Boucher's silence would have constituted an admission even if MacKenzie had been an incompetent lunatic.

> "MacKenzie said it and a reasonable jury like anybody else might infer that whether he was crazy at the time or not, he meant it, for whatever that is worth and I will allow it on that basis." (Emphasis added). (App. 1344).

The quoted language makes plain that everyone realized at the time that it was MacKenzie's statement, and not Boucher's silence, which the Government desired to place before the jury. To have permitted this to occur was reversible error.

B. The Evidence That Was Erroneously Excluded and the Charge that Was Erroneously Denied.

Appellants contend that the trial court abused its discretion when it permitted the Government to present to the jury the collateral matters discussed in Section A of this Point II. Once such evidence was admitted, however, elementary fairness dictated that appellants be given an opportunity to meet the Government's proof. The court disagreed, refusing to apply the same evidentiary standards to the rebuttal evidence proffered by the defense (as detailed in Point III of our initial brief) that it had employed with respect to the Government's allegations. This limitation on the defense served to compound the error.

An analogous situation led to the reversal of a conviction on income tax evasion in Watkins v. United States, 287 F.2d 932 (1st Cir. 1961). In that case, the district court had permitted the Government to introduce various evidence as to the defendant's finances, but had excluded evidence on certain aspects of his business dealings which tended to lessen the probability that he had intentionally omitted

certain receipts from his tax returns. The First Circuit held that "[p]articularly in view of the wide scope given the government," the defendant had been prejudiced by such exclusions (Id. at 934) (emphasis added).

This Circuit reached a similar result in a case even more closely analogous to our case. In United States v. Wertheimer, 434 F.2d 1004 (2d Cir. 1970), the defendant was convicted of submitting fraudulent payment claims to the Government. Finding that the Government's evidence had led the jury to believe that the defendant had failed to deliver certain materials for which he had been paid $25,000, this Court held that it was reversible error for the trial court to have refused to permit the defendant to prove that the materials had eventually been delivered. Even though this Court recognized that "there may technically have been no error" (Id. at 1006), a reversal was ordered because the Government's presentation (compounded by remarks in summation) had placed the defendant at an unfair disadvantage. This was precisely what happened in our case with respect to the value of the Arctic, and particularly in regard to the appellant's offer of evidence on post-1970 developments tending to show that FOF's Arctic interest was, and is, extremely valuable.

1. Subsequent Developments in the Arctic. As detailed in Point III of our initial brief, throughout the trial the Government impugned the value of the Arctic so as to convince the jury that Mecom and COG would not have been willing to purchase their Arctic interests unless they had

received secret inducements and guarantees. This contention was then highlighted in the prosecutor's summations, particulatly through the use of MacKenzie's remark that the price paid by COG had been "ridiculous." Indeed, the prosecutor stressed to the jury "[t]hat is the issue in this case." (App. 1347) (Emphasis added).

Appellants efforts to combat the Government's misleading presentation as to the value of the Arctic were unduly restricted by the trial court's refusal to permit them to introduce evidence of post-1970 developments in the Arctic which demonstrated objectively that FOF's Arctic interest had immense value. The exclusion of this vital evidence provided the Government with an unfair advantage at trial and requires reversal of the conviction. Wertheimer, supra; Watkins, supra.

The Government does not dispute the fact that subsequent developments are relevant to an assessment of value at an earlier time (G. Br. at 112n.), but it argues that the cases cited by Boucher for that proposition all involved civil claims. To the extent that any such distinction is meaningful, it cuts against the Government's argument; for if evidence is admissible to support the contentions of a civil litigant surely a criminal defendant should be permitted an even greater latitude it presenting evidence to rebut criminal charges.

The Government's further contention that subsequent developments indicating the Arctic's intrinsic value have no bearing on what someone would have been willing to pay for an interest in the Arctic in 1969 is incorrect. Such evidence confirms that informed oil and gas experts could have reasonably

believed in 1969 that the Arctic had a value vastly in excess of $15 per acre. Moreover, the Government's argument in this regard is flatly inconsistent with its own assertion that the comparison of the market price for Global's stock following the spin-off with the net asset value of FOF shares prior to the spin-off was fair prosecutorial argument.

In seeming desperation, the Government relies on Rule 403 for approval of its ability to denegrate the value of the Arctic without appellants having an opportunity to show its true value. Once the prosecutors inserted that element into the case, it ill behooved them to request exclusion of rebuttal evidence on the ground that appellants' responses would inject a complex issue into the trial. The trial court recognized this problem early in the case when, in addressing to the prosecutor, Judge Frankel declared:

"THE COURT: You keep telling me I should not hear things like present value, and I think you would be right if you were trying the kind of case the indictment seems to me to tell about, and then you put in 2W and all this literature and you say, well, they were also painting rosey pictures and saying three billion.

I don't think Mr. King may be convicted on the statement that this stuff is going to be worth $3 billion.

MR. WING: Absolutely not.

THE COURT: So why do you put it in?

MR. WING: Because if we didn't put it in they would put it in.

THE COURT: No. If you didn't put it in and they tried to put it in I could keep it out. But the point is that you put it in thinking they are going to put it in and then it is in and the case is unmanageable. (App. 1209-10).

Despite the recognition, implicit in the above quoted remarks by the trial court, that appellants would be at an unfair disadvantage if they were not able to present evidence of subsequent developments in the Arctic to rebut the Government's arguments, the Court refused to allow appellants to present their most cogent and compelling rebuttal evidence. This deprived them of a fair trial.

2. The Understanding Charge. In support of the trial court's refusal to instruct the jurors that they were required to understand the Government's charges before they could convict, the Government nit picks with the precise language of the requested charge -- "especially the statement that the jury must 'fully understand the nature of the proof' in order to convict" (G. Br. 128). Judge Frankel made plain in ruling upon requests to charge that he alone would compose the precise language of his jury instructions and that when he ruled favorable on a request, such ruling simply meant that he would give the substance of the request -- "it doesn't mean every word" would be given (Tr. 4171). Indeed, Judge Frankel declined to make specific rulings with respect to language (Tr. 4182). Moreover, he did not deny appellants' request for an "understanding" charge because of any quarrel with its precise language, but rather because, in his words, he does not "give that kind of thing" (App. 1342E).

C. Cumulative Error and Discretion

Each of the foregoing erroneous evidentiary admissions or exclusions discussed in this Point II (as well as in Point III of our initial brief), constitutes and independent ground warranting reversal. While the Government defends each of these matters under the familiar umbrella of the trial court's discretion, this Court has often recognized that "it is equally plain that this discretion is far from unlimited and that appellate courts have a vital role to play in overseeing the exercise of this discretion." United States v. Robinson, 544 F.2d 611, 616 n.6 (2d Cir. 1976).

The cumulative effect of the challenged evidentiary rulings was to admit inflammatory and collateral charges against appellants but to deny them a fair opportunity to meet these charges. "Particularly in view of the wide scope given the government," these rulings, in the aggregate, mandate a reversal. Watkins v. United States, 287 F.2d 932, 934 (1st Cir. 1961).

CONCLUSION

In view of all the foregoing, as well as the points raised by appellant King, the convictions in this case must be reversed.

Respectfully submitted,

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